United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

74-1179

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P&S

To be argued by
WILLIAM F. MCNULTY

United States Court of Appeals
FOR THE SECOND CIRCUIT

BERNARD TOBIN, as father and next friend of
DONNA ELLEN TOBIN, a minor,
Plaintiff-Appellee-Appellant,

against

LOUIS EMPLOYMENT AGENCY,
Defendant,

BEN J. and JULIUS SLUTSKY, a partnership doing
business as NEVELE COUNTRY CLUB,
Defendants-Appellants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANTS-APPELLANTS-APPELLEES

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Introductory Statement

This Reply Brief of Appellants is addressed principally to the inconsistent arguments under Points I and II of Appellee's Brief.

No comment will be made on Appellee's claim that Appellants "misstated the law at the trial and they continue to do so in their brief to this Court" (App'ee's Br., p. 6) other than to observe that the principles of law applicable

in this diversity case are the principles of New York law laid down by the New York Court of Appeals in *DeWolf* v. *Ford* (1908), 193 N.Y. 397, 86 N.E. 527, 21 L.R.A., N.S. 860, and applied by this Court in *McKee* v. *Sheraton-Russell, Inc.*, 268 F. 2d 669 (2 Cir., 1959), which are set forth, and it is believed accurately so, on pages 10-14 of Appellants' Brief.

It should further be observed that there is no substance to Appellee's claim that on this appeal, that Appellants "now expand their argument and contend that their motion [for a direct verdict] should have been granted because the plaintiff failed to produce evidence from which the jury could have found that the defendants were negligent in either hiring or supervising Stevens" (App'ee's Br., p. 6). As this Court will see when it examines the Record below and the argument under the Second Point of Appellants' Brief (Apps' Br., pp. 18-19), these were merely "additional" grounds on which Appellants moved for a directed verdict and the only reason that they moved for a directed verdict on these "additional" grounds is that these were "additional" specifications of negligence on the part of Appellants alleged in the Fourth and Fifth causes of action in amended complaint herein (13a-15a) and which Appellee unsuccessfully sought to establish at the trial of this action (143a-150a) and on which she now still relies on this appeal (App'ee's Br., p. 9).

POINT I

The argument under Point I of Appellee's Brief at the very least mandates a new trial of this action.

As this Court will see when it examines Appellee's Brief, Appellee attempts to "blow hot and cold" at one and the same time. Under Point I of her Brief she argues that there were questions of fact for the jury and under

Point II she argues that there were no questions of fact for the jury and that the Trial Judge therefore did not err in granting, her motion for a directed verdict on the liability issue at the close of the evidence.

In order to justify the ruling of the Trial Judge denying the motion of Appellant for a dismissal at the close of the evidence (152a-156a), she argues under Point I of her Brief that she "produced evidence from which the jury could have inferred that the defendants should not have acted as they did and that the defendants should have acted otherwise" and that the failure of the defendants to exercise reasonable care for her protection as a guest in the hotel "could have also been inferred from any or all of the following circumstances: the possession of a knife by Stevens [even though there is no proof that the defendants knew that Stevens had a knife on his person], Stevens' loitering in the lobby and public areas of the Hotel, and Stevens' access to the elevators used by paying guests of the Hotel" and that the jury could also have "inferred that the defendants breached their duty of reasonable care by failing to check adequately into Stevens' background and to interview him fully prior to his employment" (App'ee's Br., Pt. I, pp. 8-9).

If the jury could have drawn such inferences as these from the proof in this case—which Appellants contend it could not have done—then the Trial Judge obviously erred in directing a verdict in favor of Appellee because few principles of law are more elementary than the principle that, where inferences can or may be drawn from the proof, it is the function of the jury and not the Court to draw such inferences, if it is disposed to do so.

Having thus established, at least to the satisfaction of herself or her counsel, that inferences of negligence on the part of the jury could be drawn from the proof in this case, Appellee then does a complete "about face" and argues under Point II of her Brief that "The District

Court did not err in granting plaintiff's motion for a directed verdict of liability at the close of the case" (App'ee's Br., Pt. II, pp. 10-12).

To support this latter claim Appellee argues that "The defendants presented no evidence"—which, of course, they were not required to do since the burden of proof was on Appellee—and that, after she moved for a directed verdict at the close of the evidence, "The defendants joined in the motion"—but were later allowed by the Court to withdraw their consent to join in the motion for a directed verdict (157a-158a)—and, finally, on the ground that Appellants offered no evidence "from which the jury could have concluded that the defendants exercised reasonable care" (although the burden of establishing the absence of reasonable care was on the plaintiff) and that "the evidence was so strongly and overwhelmingly in favor of the plaintiff that reasonable and fairminded men in the exercise of impartial judgment could not have arrived at a verdict against the plaintiff" (App'ee's Br., Pt. II, pp. 10-11).

In passing, it will be observed that in this portion of her Brief Appellee fails to point to a single item of proof that would have justified the Trial Judge in directing a verdict in her favor on the liability issue in this case.

POINT II

On the basis of the Record presently before this Court Appellee clearly failed to establish a *prima facie* case and the motion of Appellants to dismiss (152a) therefore should have been granted.

It is submitted that this Court will search the Record below in vain for any proof that is fairly calculated to establish that Appellants breached any duty which they owed to Appellee under the New York law as enunciated

in *DeWolf* v. *Ford, supra,* and as later followed by this Court in *McKee* v. *Sheraton-Russell, Inc., supra.*

Dated: New York, New York, May 10, 1974.

Respectfully submitted,

LEO E. BERSON,
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United States Court of Appeals
for the Second Circuit

376—Affidavit of Service by Mail — The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

Bernard Tobin, as father and next friend of
Donna Ellen Tobin, a minor,

Plaintiff-Appellee-Appellant

against
Louis Employment Agency
Defendant
Ben J. and Julius Slutsky, a partneeship doing
business as Nevele Country Club,
Defendants, Appellants-Appellees

On appeal from the United States District Court for
the Southern District of New York

AFFIDAVIT OF SERVICE BY MAIL

State of New York, County of New York **ss.:**

Raymond J. Braddick,
agent for Leo E. Berson Esq.
Defendants, Appellants-Appellees, **being duly sworn deposes and says that he is the attorney for the above named herein. That he is over 21 years of age, is not a party to the action and resides at** 8 Mill Lane Levittown, New York

That on the 14th **day of** May, 1974, **he served the within**
Reply Brief of Defendants-Appellants-Appellees
upon see attached list
attorney s for the above named see attached list

by depositing 3 copies to each **of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at 90 Church Street, New York, New York**

directed to the said attorney for the see attached list
at No. see attached list

N. Y., that being the address within the state designated by them for that purpose, or the place where they then kept an office, between which places there then was and now is a regular communication by mail.

Sworn to before me, this 14th.
day of May 1974

Raymond J. Braddick

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
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